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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 29.

CARL A. HANSBERRY, NANNIE L. HANSBERRY; SUPREME LIBERTY LIFE INSURANCE COMPANY, an Illinois Corporation, HARRY H. PACE, JAMES JOSEPH BURKE and ISRAEL KATZ,

Petitioners,

v.

ANNA M. LEE, EDWARD L. GOVANUS, ESTHER GOVANUS, LOUISE C. ANDERSON, LYMAN M. ANDERSON and KATHRYN LUTTRELL,

Respondents.

WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR RESPONDENTS

[illegible] ROY SHANNON,
McKENZIE SHANNON,
WILLIAM C. GRAVES,
PRESTON B. KAVANAGH,
RANDOLPH THORNTON,
Attorneys for Respondents.

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SUBJECT-INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Statement	3-14
Covenant	4
Pleadings	5-7
Conspiracy	8
Decree	13
Summary of Argument	14
Argument	15
1. The Finding of Fact by the Illinois Supreme Court That the Only Fraud in This Record is on Petitioners is Supported by Competent Evidence and Conclusive Here	15
2. Restrictive Covenants Such as This are Valid and do Not Offend the Federal Constitution	19
3. The Illinois Law Enforces the Doctrine of Res Judicata in Representative Suits	23
4. The State Court Decree Does Not Offend the Fourteenth Amendment	33
5. Specific Performance Does Not Offend the Fourteenth Amendment	36
6. The Record Supports the Injunction Against Katz	38
7. The Insurance Company is Not Exempt as a Mortgagee	39
8. Conclusion	40

TABLE OF CASES.

Bayer v. Block, 246 Ill. App. 416	28
Burke v. Kleiman, 277 Ill. App. 519	2, 3, 4, 5, 7, 9, 11, 13, 15, 16, 17, 18, 22, 30
Colgate v. Harvey, 296 U. S. 404	35
Cook v. Lutz, 37 S 6290 Superior Court Cook County, Ill.	6

Page.

Cook v. Yondorf, 34 S 1261 Superior Court Cook County, Ill. 3, 6
Cornish v. O'Donoghue, 30 F. (2d) 983 ..... 14, 37
Corrigan v. Buckley, 299 Fed. 899 ..... 19, 20, 34
Corrigan v. Buckley, 271 U. S. 323 ..... 14, 19, 21
Covington v. 1st Nat. Bank of Covington, 198 U. S. 100. 33
Enterprise Irrig. Dist. v. Farmers Mutual Canal Co., 243 U. S. 157 35
Erie R. R. Co. v. Tompkins, 304 U. S. 64 23
Fox River Co. v. R. R. Comm., 274 U. S. 651 38
Greenberg v. Chicago, 256 Ill. 213 26
Groves v. Farmers State Bank, 368 Ill. 35 23
Hanna v. Read, 102 Ill. 596 26
Harding Co. v. Harding, 352 Ill. 426 27
Kerfoot v. Farmers & Merchants Bank, 218 U. S. 281 .. 19
Kersh Lake Drainage Dist. v. Johnson, 309 U. S. 485 ..... 14, 18, 19, 33
Klus v. Ruszel, 353 Ill. 179 29
Koehler v. Rowland, 275 Mo. 573 21
Lee v. Hansberry, 291 Ill. App. 517 ..... 2, 4, 6, 22
Lee v. Hansberry, 372 Ill. 369 2
Leonard v. Bye, 361 Ill. 185 24
Los Angeles Investment Co. v. Gary, 181 Cal. 680 21
Madden v. Kentucky, 309 U. S. 83 36
Miedreich v. Lauenstein, 232 U. S. 236 19
Oklahoma Packing Co. v. Gas Co., 309 U. S. 4 33
Parmalee v. Morris, 218 Mich. 625 21
Penoyer v. Cohn, 34 S. 16816, Superior Court of Cook County, Ill. 4, 6
People v. Prather, 343 Ill. 443 29
People ex rel. Modern Woodman v. Circuit Court, 347 Ill. 34 26
Phelps v. Chicago, 331 Ill. 80 33
Plath v. Delaunty, 35 C 8078, Circuit Court of Cook County, Illinois 5
Queensborough Land Co. v. Cazeaux, 136 La. 724 21
Russell v. Wallace, 30 F. (2d) 981 38
Schmidt v. Modern Woodman, 261 Ill. App. 276 25
Svalina v. Saravaus, 341 Ill. 236 36
Torrey v. Wolfes, 6 F. (2d) 702 38
Union and Planters Bank v. Memphis, 189 U. S. 71 ... 33
Waters-Pierce Oil Co. v. Texas, 212 U. S. 116 19
Wright v. Georgia R. R. and Banking Co., 216 U. S. 420 33

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BRIEF FOR RESPONDENTS.

THE OPINIONS BELOW.

A temporary injunction in this case was issued by the Circuit Court of Cook County, Illinois, on July 8, 1937. It is not reported but appears at page 20 of the record

and was affirmed on interlocutory appeal in *Lee* v. *Hansberry,* 291 Ill. App. 517. The final decree of the Circuit Court was entered August 19, 1938. It is not reported but appears at page 72 of the record. The opinion of the Supreme Court of Illinois is reported at 372 Ill. 369, (R. 327-336) and the principal case relied upon as *res judicata* therein is *Burke* v. *Kleiman,* 277 Ill. App. 519. Rehearing was denied December 13, 1939 and certiorari granted by this court on April 22, 1940. (R. 340)

JURISDICTION.

Jurisdiction in this case is based upon Section 237 (b) of the Judicial Code, as amended, Title 28 U. S. C. Section 344 (b). The petitioners argue upon several grounds that the decision of the Supreme Court of Illinois denies them due process of law under the Fourteenth Amendment to the Federal Constitution.

Petitioners in their brief rely for reversal principally upon the ground of fraud. This fraud is said to have occurred in a prior suit involving the same subject matter, that is, this particular restrictive covenant running with the land which bound the signers and their successors not to sell or lease their property to negroes for a period of approximately 21 years.

The trial court and the Supreme Court of Illinois both held that the prior suit, *Burke* v. *Kleiman,* 277 Ill. App. 519, was *res judicata* upon the question of the validity of this restrictive covenant; that it was a class or representative action, binding all those who signed the covenant or as privies succeeded to the titles of the signers. The trial court found, on the evidence, that petitioners here had conspired together by devious means to introduce negroes into a section restricted to white occupancy and that their acts were characterized by misrepresentation, deceit and fraud, including the

use of a white man acting as a dummy purchaser for the negroes. The Supreme Court of Illinois in addition to sustaining the ultimate fact of the conspiracy rested its decision principally upon the doctrine of *res judicata.*

Since the application of the doctrine of *res judicata* is primarily a matter of the law of Illinois, the question here is limited to whether there is evidence to support the findings below that *Burke* v. *Kleiman, supra,* was a decision in a class or representative action, reached in good faith and not fraudulent or collusive. We think that the evidence in support of these findings is conclusive.

The other issues with respect to the application of the decree to the individual petitioners do not appear to raise substantial federal questions.

STATEMENT.

This action is one of several class suits instituted by property owners in the Washington Park Subdivision of Chicago to enforce a covenant running with the land, of more than ten years standing, against ownership or occupation of their real estate by negroes. The covenant restricts some 550 parcels improved with residences and apartment buildings in an area about one-half mile square (R. 276A). It is bounded on the north by the great Washington Park and on the east by the Midway and the University of Chicago with its affiliated activities and other white occupancies. To the West is now negro occupancy and to the south, mixed. In no sense can it be called a white pocket in the black belt as petitioners contend. On the contrary aggressive enforcement of the covenant has made the subdivision a fortified frontier protecting social and real estate values for many years.

The covenant appears *in haec verba* in *Burke* v. *Kleiman,* 277 Ill. App. 519 and at pages 315-324 of the record. In substance it provides that for the best interests of the parties and the property described, none should be sold, leased or permitted to be occupied by negroes for a period of approximately 21 years, providing the owners of 95 per cent of the frontage signed and recorded the agreement by December 31, 1928. It further provides that the restrictions are to be considered appurtenant to and running with the land and binding upon and for the benefit of each party and enforceable by any party by any permissible legal or equitable proceeding including injunction and specific performance. The restrictions are made binding upon and for the benefit of and enforceable by and against each party, his successors and assigns, and the heirs, executors, administrators and successors of them respectively.

It was executed on September 30, 1927, signed by the owners of 95 per cent of the frontage, according to the computation of the Woodlawn Property Owners Association and recorded on February 1, 1928. Its execution and validity have been adjudicated and sustained by the Superior Court of Cook County, Illinois, in *Cook* v. *Yondorf,* General No. 34 S 1261 (R. 294); *Penoyer* v. *Cohn,* General No. 34 S 16816 (R. 301); and the Illinois Appellate Court in *Burke* v. *Kleiman,* 277 Ill. App. 519, and *Lee* v. *Hansberry,* 291 Ill. App. 517. All of these cases remain in full force and effect.

This complaint was filed in the Circuit Court of Cook County in June, 1937. It alleged the execution, recording and validity of the covenant as running with the land. It alleged that the six respondents (plaintiffs in the trial court) were owners of restricted property who had signed the agreement or traced their title by mesne conveyances to signers thereof and that they were com-

plaining on behalf of themselves and other plaintiffs similarly situated. It alleged that petitioners (except the insurance company) were owners of restricted property who had signed the agreement or traced their title by mesne conveyances to signers thereof. It alleged that the white Petitioner Burke, after resigning with bad feeling as an officer of the Woodlawn Property Owners Association, threatened to put negroes in every block of the subdivision and that in furtherance of this threat, he conspired with the white dummy Crook to fraudulently conceal from the First National Bank of Englewood, that Crook was purchasing a restricted parcel for the colored Petitioners Hansberry, with mortgage money supplied by the Petitioner Supreme Liberty Life Insurance Company, of which the colored Petitioner Pace is president. It further alleged that the white Petitioner Katz had threatened to sell his restricted property to negroes; that all of the petitioners had constructive notice of the covenant; that Petitioner Burke had actual notice of the covenant by reason of the prior representative suit he brought in his wife's name to enforce it in the Superior Court of Cook County, General No. 567687, wherein the covenant was decreed to have been duly executed upon a stipulation of facts and in full force and effect, which was affirmed on appeal in *Burke* v. *Kleiman,* 277 Ill. App. 519; that Petitioner Katz had actual notice as a signer thereof; that Petitioners Hansberry had actual notice by reason of a prior eviction from property restricted by the same covenant for fraudulently representing to a receiver of the Circuit Court of Cook County that they were white, (*Plath* v. *Delaunty,* General No. 35 C 8078) (R. 277) and that Petitioner Pace had actual notice as a defendant in a prior suit still pending to evict him from property restricted by the covenant, which he likewise

acquired through the fraud of Burke with mortgage money from the insurance company of which he is president. *Cook* v. *Lutz,* Superior Court of Cook County, General No. 37 S 6290 (R. 131). The complaint asked that the fraudulent deed from the white dummy Crook to the colored Petitioners Hansberry be declared void and for injunctive relief and specific performance. (R. 1-14.)

Petitioners' motion to strike the complaint attacked the execution and validity of the covenant under Illinois law and alleged its enforcement would deprive them of their property without due process and deny them equal protection of law under the Federal Constitution. The motions were overruled and a preliminary injunction restraining Burke and Katz from selling or leasing restricted property to negroes, Pace and the Supreme Liberty Life Insurance Company from making loans on restricted property to or for negro occupancy (R. 21) and ordering the Hansberrys to vacate within 90 days or be ousted by a writ of assistance, was sustained on interlocutory appeal. (*Lee* v. *Hansberry,* 291 Ill. App. 517)

After a change of venue, the answers came in attacking again the execution and validity of the covenant under Illinois law and the Federal Constitution. Respondents moved to strike the answers on the ground that the execution and validity of the covenant had been sustained in the three prior class suits; *Burke* v. *Kleiman,* 277 Ill. App. 519; *Cook* v. *Yondorf,* Superior Court of Cook County, General No. 34 S 1261 (R. 294); and *Penoyer* v. *Cohn,* Superior Court of Cook County, General No. 34 S 1681 (R. 301) and formally pleaded *res judicata* as an estoppel by verdict against all of the petitioners and as an estoppel in bar by judgment against Petitioner Katz, who signed the covenant and

Petitioners Burke, Hansberry and Pace, who derived title through signers of the covenant.

The Chancellor proceeded to a trial on the merits without settling the pleadings, reserving his ruling thereon in the following order:

> "This matter coming on to be heard on the plea of counsel for plaintiffs that the case of *Burke* v. *Kleiman* be held *res judicata* as to the issues involved herein, on certain objections filed to the answers, and motions of the several defendants to dissolve the temporary injunctions heretofore issued herein, the court having examined the pleadings herein and heard the arguments of counsel for the respective parties and being fully advised in the premises,
>
> "It is hereby ordered that the matter proceed to a hearing and trial of the merits, and that ruling of the court upon the above plea, objections and motions be reserved until after the cause has been heard on its merits". (R. 54)

Respondents thereupon introduced in evidence the covenant and the pleadings and decree in the prior class suit of *Burke* v. *Kleiman*, 277 Ill. App. 519. In the stipulation therein, neither party admitted the materiality, relevancy, or competency of the facts stipulated, each reserving the right to offer further and other evidence on these and other issues (R. 279). Without limitation, therefore, the court had jurisdiction of every issue which either party could have urged, and so recited in its decree. (R. 236-243.) Respondents then established that all parties plaintiff and defendant (except the insurance company) had signed the agreement or taken their titles subject to the covenant from persons who had signed it, and proved as the trial court found, that Burke, a disgruntled former head of the white property owners association of the district, had

formed a conspiracy with the other petitioners in this court to destroy the effect of the restrictive covenant by introducing negroes into the restricted district; that in pursuance of what the trial court called a "fraudulent scheme", Burke persuaded a white man named Crook to offer to purchase the premises at 6140 Rhodes Avenue, which was subject to the covenant and, by "r..srepresentation, deceit and fraud", prevailed upon the owner of the premises to sell to Crook; that Crook was not a bona fide purchaser but was acting for and on behalf of petitioner Carl Hansberry, a negro; that this purchaser was financed by petitioner life insurance company, of which petitioner Pace was president; that Crook thereupon conveyed the premises to Hansberry and his wife, who took possession; and that these acts "were a part and parcel of the fraudulent scheme and conspiracy inaugurated by James Joseph Burke that said restricted area would be no longer free of negro inhabitants". (R. 80-81.)

At the close of respondent's case in chief, the following objection to the introduction of any evidence by petitioners with respect to the execution or validity of the covenant was noted:

> "In order to expedite matters as far as possible so there won't be a constant run of objections here any more than is necessary, I want to make a general objection such as the other side did in reference to our testimony—that is, if it is agreeable to the Court and counsel to have a general objection and have it carried through without my having to repeat it each time—in this behalf.
>
> "That as to the defendants Israel Katz, Carl A. Hansberry, Nannie L. Hansberry, J. B. Crook, Hallie C. Crook, James Joseph Burke and Harry H. Pace, each of whom is shown by the record to have either signed the Restrictive Agreement in-

troduced in evidence as Plaintiffs' Exhibits 5, 5-A, B and C, or are persons in privity of estate as grantees either direct or remote, of persons who had signed the Agreement, we object to them, or any witnesses for them, or any documentary evidence which seeks to attack the validity of that Agreement as being estopped by reason of being grantees and in privity of estate.

"Then as to all of the defendants we object to any testimony by them or on their behalf which in any way seeks to attack or deny the execution, the delivery, the existence, the compliance with the conditions precedent, the enforceability of the Restrictive Agreement admitted in evidence as Plaintiffs' Exhibits 5 and 5-A, B and C, because of the estoppel, by verdict against each and all of the defendants; from attacking the validity, the delivery, the execution, the existence and enforceability of that agreement, by reason of *res judicata* through the judgment and the decree of the Superior Court of Cook County, Illinois, entered in the case of *Burke* v. *Kleiman et al.*, Gen. No. 567887, entered on October 2, 1933, being a class suit, which decree also was affirmed by the Appellate Court on November 27, 1934, in the Appellate Court for the First District, case No. 37522, entitled there *Burke* v. *Kleiman, et al.*"

* * * * * * *

The Court: "I think that is very satisfactory." (R. 283.)

Subject to this objection, petitioners introduced evidence to the effect that the required number of frontage owners had not signed the agreement; that the acknowledgements were not in order and that the character of the neighborhood had changed. The distorted impression of this evidence created by petitioners' brief, calls for corrections here. On page 11, the evidence that less than the required number of frontage owners

signed the covenant was excluded as incompetent when respondents' objection was sustained. On page 11, it is said the signature of Petitioner Katz was obtained by fraud and trickery, with citations to pages 60-61 and 172 of the record. The first refers to an averment in Katz' amended answer and the second to his abstracted testimony. We ask the court to read the latter and direct its attention to the testimony of respondent's witness Sheedy who took the signature and acknowledgment (R. 189, 319, 323) and to Chancellor Bristow's remark that Katz' testimony "wasn't very satisfactory or convincing" (R. 197). On page 11 and 12 of petitioner's brief, it is stated that the proof shows none of the signatures were acknowledged according to Illinois law. The citation in support of this statement (R. 144-5) is an objection made by petitioner's counsel and the testimony of respondent's witness Sheedy referred to *supra* (R. 189). On page 12, the reference to the testimony of respondent's witness Sommerman is not complete. While it is true she said she did not go through any formality in acknowledging her signature, she added on redirect that she did not know what an acknowledgment was (R. 92-3, 318, 320). In view of the fact that the restrictive agreement was signed and acknowledged more than ten years prior to the date of taking testimony in this case, it is not to be wondered that the recollection of the witnesses should be a little hazy on this point. The Illinois courts properly paid no attention to it.

On page 7, petitioners state as a fact that more than 125 colored families have lived in the restricted area for three to five years before this suit was filed. The citation (R. 58) is to another averment in Katz' amended answer.

With respect to the prior suit of *Burke* v. *Kleiman*, petitioners' brief states at page 16 that Burke's Answer (R. 31-32) charges the invalidity of the agreement was known to the officers of the association at the time the several suits to enforce it were filed and that this charge was never rebutted. A careful reading of Burke's answer reveals no such allegation, as the Supreme Court of Illinois pointed out (R. 330-331). He states under oath that the first time he "believed" the covenant to be invalid was four months before the Hansberry transaction of May 27, 1937 (R. 269). Burke filed the Kleiman complaint in his wife's name four years before acquiring his belief that the covenant was defective (R. 229). He was active in the association at that time and alleges he acted in good faith in that suit. His only reference to officers of the association is that they conducted no investigation of the signed frontage before the attorneys signed the stipulation.

Two of the three living defendants in the prior suit, Isaac Kleiman and Dr. James L. Hall, a colored physician, testified for petitioners that they did not employ counsel or authorize a stipulation of facts in that case (R. 171). In referring to this testimony on page 17 of their brief, petitioners fail to disclose that a fourth defendant, one Charles A. Sopkin was the attorney who represented his co-defendants. (R. 236.) The testimony of the witnesses, Kleiman and Hall, was the only evidence offered by the petitioners on the trial of this case, as to the institution or conduct of the case of *Burke* v. *Kleiman*. Their testimony is the sole evidence in the record upon which petitioner's charges of fraud are founded.

At the close of petitioner's evidence, respondents elected to stand on their plea of *res judicata;* their

general and specific objections that petitioner's computations of frontage and ownership were based on tract books twice removed from the original plats (R. 285), which were not legible (R. 287), and did not show the situation as it existed in 1928 (R. 285), but antedated, in part, the Great Chicago Fire of 1871 (R. 285). The witness had no personal knowledge of their accuracy (R. 285), which was questioned by the Chancellor, who said, "My point is this. There must be something lacking in these tract records to bring about such a tremendous discrepancy" (R. 291), and which included a substantial amount of public school, playground and church frontage not contemplated by the covenant to show the signed frontage was less than the required 95 per cent (R. 287-8). Respondents also relied on the sworn affidavit of Charles A. Churan, counsel for the Woodlawn Property Owner's Association that the owners of more than 95 per cent of the frontage had signed the agreement, according to a chart showing dimensions of lots and blocks kept by the Association in January, 1928 (R. 208). Respondents further relied upon the sworn affidavit of George W. Cook, a director of the association, that he kept a personal check on the property signed by marking it on a chart with colored crayon and knows positively and by careful measurements that more than 95 per cent of the frontage was signed before February 1, 1928, a fact which was verified at a mass meeting of the association and a resolution passed to that effect just before the agreement was recorded. (R. 209.) Respondents further relied on their amended complaint which reduced the total frontage involved (R. 54) and their showing that additional signatures were recorded on December 29, 1928. (R. 208.)

The decree found (1) Petitioners in court with unclean hands and thereby estopped from attacking the

prior adjudication of the execution and validity of the covenant in *Burke* v. *Kleiman,* (2) Respondents to be members of a class having common rights requiring protection, (3) Petitioners (except the insurance company) to be members of the same class as signers or remote grantees of persons who signed the agreement and bound thereby, (4) *Burke* v. *Kleiman* to be a class suit properly pleaded and proved as *res judicata* to the execution and validity of the covenant, (5) the covenant to be in full force and effect and running with the land, (6) Petitioners (including the insurance company) guilty of the conspiracy to violate the covenant and (7) the Hansberrys in unlawful possession of the restricted property and that the deed to them was void and a nullity. It made the temporary injunction permanent and specifically enforced the covenant. It relieved the petitioner Hansberry from suffering forfeitures, however, by ordering a master to reconvey Hansberry's title to his grantor, Crook, (the last white owner), if Hansberry did not himself comply with the covenant by conveying it to someone other than a negro within thirty days. (R. 72.)

Page 17 of Petitioner's brief draws unwarranted deductions from the affidavit of Fred L. Helman, filed in support of a motion for a new trial, which appears at pages 203-6 of the record and speaks for itself. He alleges that he knew from a personal investigation in 1929 that less than the required number of frontage owners signed the covenant but does not, as petitioners imply, state that he ever communicated this information to his fellow officers of the Association in his conferences with them. This is another malicious attempt of petitioners to surround the case of *Burke* v. *Kleiman* with fraud when, in fact, no fraud existed and the affidavit is no foundation for the announcement that the

officers of the association knew the agreement was invalid when that suit was filed.

The motion was denied and an appeal perfected to the Supreme Court of Illinois which affirmed the decree in all respects. The question of fraud was directly raised in that appeal and the court held that if any fraud appeared in the case, it was that of Burke, acting pursuant to his threat to put negroes in every block of the restricted area. (R. 331.)

SUMMARY OF THE ARGUMENT.

The finding of fact by the Supreme Court of Illinois that the only fraud in this record is on the petitioners is supported by the evidence and conclusive. *Kersh Lake Drainage District* v. *Johnson,* 309 U. S. 485. Restrictive agreements by private property owners against ownership or occupation of their land by negroes for twenty-one years are valid and do not offend the Federal Constitution. *Corrigan* v. *Buckley,* 271 U. S. 323. A negro who secured title to restricted property by fraud has no standing in a court of equity to question the bar of *res judicata* of a prior class suit as to the execution and validity of the covenant. Specific performance of the covenant running with the land does not deny him due process. *Cornish* v. *O'Donoghue,* 30 Fed. (2d) 983. Katz signed the agreement and is properly enjoined from carrying out his threat to sell to negroes. The proviso in the covenant protecting mortgages from impairment does not permit the Supreme Liberty Life Insurance Company, as mortgagee, to induce breaches of the private contract and it is properly enjoined from so doing. There being no substantial federal question, the Supreme Court of Illinois should be affirmed or the writ dismissed for want of jurisdiction.

ARGUMENT.

1. The Finding of Fact by the Illinois Supreme Court That the Only Fraud in This Record is on Petitioners is Supported by Competent Evidence and Conclusive Here.

The petition and briefs in support thereof have attempted to distort as fraudulent the facts proved in this record to such an extent that we will consider it first. There appears to be no controversy about the conspiracy in the present case, which is supported by the record, if not admitted by petitioners. However, they have consistently tried to create a suspicion of fraud in the prior case of *Burke* v. *Kleiman,* which has been held *res judicata* here. Eliminating respondent's pleadings, the testimony of their witnesses and pronouncements of the courts, that case is referred to in this record exactly four times. It is found in petitioner's pleadings, of which Burke's answer is typical. As pointed out in our statement of facts, he alleged under oath that he acted in good faith when he sued Kleiman in his wife's name and did not believe the covenant lacked sufficient signatures until four years later. (R. 31.) It next appears in the testimony of Kleiman and Hall, defendants in that suit, who testified for petitioners that they neither employed counsel in that case nor authorized a stipulation. (R. 171-172.) But if their testimony is to be believed, it then appears that they were served with process and thereafter ignored the case entirely, although it was fought vigorously by one of their co-defendants through the Appellate Court of Illinois and culminated in a decree against them for costs and in a writ of assistance to remove Hall from the premises involved in the suit. (R. 236-246.) It appears more probable that they left the defense of the suit entirely to attorney Sopkin, their fellow defendant. To infer otherwise would be

to disregard human nature unless these witnesses were so in the habit of being sued that they thought nothing of it in this instance. It next appears as Plaintiff's Exhibits 28, 29 and 30, which are the opinion and mandate of the Illinois Appellate Court and the stipulation of facts therein. (R. 278.) These exhibits are competent evidence. Its final appearance is in the Helman affidavit in support of the unsuccessful motion for a new trial (R. 203-206) wherein he states he knew from a personal investigation that 95 per cent of the frontage had not signed the covenant but did not state that he communicated his discovery to his fellow officers in the association at the time *Burke* v. *Kleiman* was instituted. Under Illinois law, pleadings and affidavits are not evidence unless offered and received as such. Neither petitioner's pleadings nor Helman's affidavit were placed in evidence. We submit that the competent evidence before the Chancellor with respect to the prior suit of *Burke* v. *Kleiman* consisted of the pleadings, appearances, stipulation, decree and mandate of the Appellate Court in support of its validity and the adverse testimony of Kleiman and Hall, defendants therein, which was entitled to whatever weight the Chancellor gave it. There is nothing whatever in this record to support the contention that plaintiff and defendants in *Burke* v. *Kleiman* were in any way in collusion or that any of them had any thought that the restrictive covenant lacked the necessary signatures after four years of operation and enforcement.

On the appeal below, we assigned as a cross-error that part of the so-called decision of the court wherein the learned Chancellor took it upon himself to *quote* Petitioner Burke to the effect that the prior suit of *Burke* v. *Kleiman* was fraudulent and collusive (R.

193.) The fact is that Burke did not testify in this case at all. We also assigned as a cross-error that part of Finding 20 which holds that "in this cause, he (Burke) represents" the prior suit of *Burke* v. *Kleiman* to have been collusive. (R. 84.) The only representations made by Burke on this record are the self-serving averments contained in his answer, which are not competent evidence as heretofore pointed out.

However, Burke in his answer did *not* allege that *Burke* v. *Kleiman* was a collusive suit but on the contrary stated that it was brought in good faith at a time when he believed the restrictive covenant to be in full force and effect. (R. 31.) In response to our request for a specific ruling on this question of fraud with respect to *Burke* v. *Kleiman,* the Supreme Court of Illinois found as follows:

> "We see no merit in the contention that *Burke* v. *Kleiman, supra,* is not *res judicata* because the fact of due execution was established by stipulation. There is no evidence of fraud or collusion in that case. Defendant Burke, who was beneficial owner of plaintiff's property, avers in his answer here that that suit was instituted at the instance of the Woodlawn Property Owners Association, whose purpose was the enforcement of the restrictive agreement. That may be true, but there is no showing of fraud or collusion in procuring that stipulation or that there was not an actual controversy in the case. At that time Burke was an officer of the Woodlawn Property Owners Association. Afterwards he resigned his position and withdrew from the association with ill feelings, and stated several times that he would put Negroes in every block of that property. In carrying out his threat, he falsely represented that prospective customers were white. As far as the record shows, if any fraud was committed, it was by Burke

after he left the association. It does not appear that he was not acting in good faith in *Burke* v. *Kleiman, supra.* * * * We cannot agree that the court erred in overruling appellants' motion to set aside the decree and for a new trial. This motion was supported by an affidavit of Fred L. Helman, which recited that Helman was executive secretary of the Woodlawn Property Owners Association from 1926 to 1933. The substance of the affidavit is that he had charge of the work of obtaining signatures to the restrictive agreement, and that at the time the case of *Burke* v. *Kleiman, supra,* was instituted, as a result of his own investigation, he knew that the owners of ninety-five per cent of the frontage involved had not signed the agreement, and that he conferred with various officials of the association in regard to the filing of that suit. The affidavit does not state that he communicated his information to anybody, or that Olive Ida Burke or any individual of the representative class for whose benefit the suit was brought, or any of the officers of the association, except Helman, knew of this fact. As far as the affidavit discloses Helman is the only person who knew of the defect. It does not allege the suit was brought at the request of the association or that it was not instituted by Mrs. Burke of her own volition and in good faith, for the benefit of herself and the other members of the class. The motion was properly denied." (R. 330-332)

We submit that this is a finding of fact by the Supreme Court of Illinois, supported by competent evidence and conclusive here. This court, by Mr Justice Black, upheld a state court decision as *res judicata* on unserved creditors in a class action in *Kersh Lake Drainage District* v. *Johnson,* 309 U. S. 485, at page 492 in the following language:

> "It is sufficient to state as to this contention that the issues of fraud and collusion raise no questions which the Supreme Court of Arkansas was not competent finally to decide. And the Supreme Court of Arkansas points out that under controlling Arkansas law the Chancery decrees 'could only have been set aside on appeal or by direct action to annul them on the ground of fraud, and as we have said no appeals were taken, and no fraud on the court in which the decrees were rendered, is reflected by this record.' "

See also *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 116, 117; *Kerfoot* v. *Farmers and Merchants Bank*, 218 U. S. 281, 288; *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243.

2. Restrictive Covenants Such as This Are Valid and do Not Offend the Federal Constitution.

The common law right of private land owners to contract for the control and disposition of their own property by executing and recording a covenant running with the land, by which they bind themselves, their heirs and assigns not to sell, lease or permit negroes to occupy their property for 21 years was settled by the leading case of *Corrigan* v. *Buckley*, 299 Fed. 899, which was dismissed on appeal by this court for want of jurisdiction. *Corrigan* v. *Buckley*, 271 U. S. 323. Except for the publicity value, there is no essential difference between these covenants and one which forbids the premises of the signers to be sold or used for commercial purposes for a limited time. In such instances, as here, property owners place a partial restriction upon the use to which their property may be put for the purpose of protecting the value of each parcel and their own investment. There has been no showing here that negroes are unable to purchase prop-

erty outside this small restricted area. In the absence of such a showing there can be no violation of a Federal right. In the *Corrigan* case, the Court of Appeals for the District of Columbia decided the covenant was not offensive to public policy, the rule against perpetuities or too harsh to be enforced between parties to the agreement. It was contended that the covenant deprived defendant and others of property without due process of law, abridged the privileges and immunities of citizens of the United States, and denied defendants equal protection of law in contravention of the Fifth, Thirteenth and Fourteenth Amendments and certain statutes in aid thereof. In disposing of this argument, Mr. Justice Van Orsdel said at page 901:

> "Appellant seems to have misconceived the real question here involved. We are not dealing with the validity of a statute, or municipal law, or ordinance; nor are we concerned with the right of a negro to acquire, own, and use property; nor are we confronted with any pre-existing rights which are affected by the covenant here in question. The sole issue is the power of a number of landowners to execute and record a covenant running with the land, by which they bind themselves, their heirs and assigns, during a period of 21 years, to prevent any of the land described in the covenant from being sold, leased to, or occupied by negroes.
>
> "The constitutional right of a negro to acquire, own, and occupy property does not carry with it the constitutional power to compel sale and conveyance to him of any particular private property. The individual citizen, whether he be black or white, may refuse to sell or lease his property to any particular individual or class of individuals. The state alone possesses the power to compel a sale or taking of private property, and that only

> for public use. The power of these property owners to exclude one class of citizens implies the power of the other class to exercise the same prerogative over property which they may own. What is denied one class may be denied the other. There is, therefore, no discrimination within the civil rights clauses of the Constitution. Such a covenant is enforceable, not only against a member of the excluded race, but between the parties to the agreement."

In reaching this result, the court followed a line of well reasoned state court decisions: *Parmalee* v. *Morris*, 218 Mich. 625; *Queensborough Land Co.* v. *Cazeaux*, 136 La. 724; *Los Angeles Investment Co.* v. *Gary*, 181 Cal. 680; and *Koehler* v. *Rowland*, 275 Mo. 573. On the appeal of *Corrigan* v. *Buckley* to this court, Mr. Justice Sanford characterized the non-federal questions as "a part of the common or general law in force in the District of Columbia" and said of the alleged constitutional questions, 271 U. S. 323, 330:

> "The Fifth Amendment 'is a limitation only upon the powers of the General Government,' *Talton* v. *Mayes*, 163 U. S. 376, 382, and is not directed against the action of individuals. The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another, does not in other matters protect the individual rights of persons of the negro race. *Hodges* v. *United States*, 203 U. S. 1, 16, 18. And the prohibitions of the Fourteenth Amendment 'have reference to state action exclusively, and not to any action of private individuals.' *Virginia* v. *Rives*, 100 U. S. 313, 318, *United States* v. *Harris*, 106 U. S. 629, 639. 'It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment.' *Civil Rights Cases*, 109 U. S. 3, 11. It is obvious that none of these

> Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void."

As in other jurisdictions, the courts of Illinois regard the legality of similar covenants to be settled by this litigation. The Illinois Appellate Court cited it as authority for upholding the agreement at bar in *Burke* v. *Kleiman,* 277 Ill. App. 519, (pleaded as *res judicata* here) at page 533:

> Appellants have not contended that the restrictions violate any of the amendments to the United States Constitution, nor that they are against public policy, but complainant has seen fit to argue, at some length, that the restrictions do not violate the fifth, thirteenth or fourteenth amendments to the United States Constitution and that they are not against public policy. While it is entirely unnecessary, because of appellants' attitude, for us to consider this argument, we may state that the following authorities cited in support of it sustain the position of complainant: *Corrigan* v. *Buckley,* 299 Fed. 899; *Corrigan* v. *Buckley,* 271 U. S. 323; *Parmalee* v. *Morris,* 218 Mich. 625; *Queensborough Land Co.* v. *Cazeaux,* 136 La. 724; *Los Angeles Investment Co.* v. *Gary,* 181 Cal. 680; *Koehler* v. *Rowland,* 275 Mo. 573.

The case was again cited on the interlocutory appeal below by the same court in sustaining this covenant a second time. (*Lee* v. *Hansberry,* 291 Ill. App. 517) and the Supreme Court of Illinois regarded the law on this point as so well settled that it affirmed the covenant without comment. This determination of its local common law by the highest court of the state and of alleged federal questions in harmony with the latest decision

of this court should not be disturbed. See *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, where Mr. Justice Brandeis in delivering the opinion of the court, said at p. 78:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

3. The Illinois Law Enforces the Doctrine of Res Judicata in Representative Suits.

Petitioners contend that one member of a class may not be sued by representatives of the class to enforce a common right. The reasoning that the interests of the person sued are necessarily in conflict with those of the class would prevent all manner of class suits. Such is not the law of Illinois which considers all members of a class having common rights needing protection bound by the doctrine of *res judicata* in a proper representative suit. In *Groves* v. *Farmers State Bank*, 368 Ill. 35, 47, 49, where the former decree was an agreed one, the court said:

> "The Circuit Court of Jefferson County is a court of general and original jurisdiction. Each appellant appearing in the petition to intervene and the motion to vacate was a party to the representative suit instituted by Groves, as a creditor of the State bank, to enforce the stockholders' liability, directly by name or by proper representation

as members of a class. The stockholders, the State Bank and its Receiver, were named defendants. Not only the stockholders but the other creditors of the State bank were also adequately represented. The Circuit Court, it is settled, has jurisdiction to entertain a representative suit in equity in which a remedy is furnished to a class of individual who have common rights and who need protection, and where the remedy is pursued by a complainant who has the right to represent the class to which he belongs, other members of the class are bound by the results in the case until the decree rendered is reversed on appeal (*Leonard* v. *Bye,* 361 Ill. 185). All the creditors were, accordingly, to be deemed parties to the cause. They are now bound by the antecedent proceedings. The final decision of the Court therein binds all persons, whether stockholders or creditors of the State bank * * *. Every material issue and question raised in the intervening petition and motion to vacate was tried and considered on the merits by a court of competent jurisdiction. In particular, by a succession of final decrees, not appealed from, the trial court determined not only that the National bank was a creditor of the State bank but also the amount of its claim. Under the circumstances disclosed by the record, the allegation that the Agreement of October 4, 1930, was *ultra vires* and void. and that the trial court lacked authority to appoint a Receiver for the liquidation of the assets of the State bank are insufficient, even if true, to afford a basis for intervention. The Circuit Court, in refusing to allow appellants to re-litigate closed issues and thereby revive a lawsuit well terminated, cannot be said to have abused its sound judicial discretion."

The case of *Leonard* v. *Bye,* 361 Ill. 185, 190, 192, is to the same effect:

"However, the appellant contends that the equity suit is an absolute nullity so far as he is con-

cerned. He says that the Circuit Court has no jurisdiction over his person, and that he is not bound, 'willy-nilly' by the gratuitous act of complainants who say they represent him there. There can be no doubt that Circuit Courts have jurisdiction over representative suits. In such suits the remedy is furnished to a class of individuals who have common rights, who need protection, and in pursuit of that remedy individuals have the right to represent the class to which they belong. The complainants in the suit purported to represent the appellant, who would be bound by the results in the case until the decree rendered there is reversed on appeal. *Greenberg* v. *City of Chicago,* 256 Ill. 213; *Harmon* v. *Auditor of Public Accounts,* 123 id. 122, 120 * * * The proceedings in the Circuit Court cannot be said to be null and void, for courts of equity have power to entertain representative suits. On appeal it might be successfully urged that the Circuit Court was proceeding erroneously in assuming equity jurisdiction and that its decree should be reversed. The Superior Court did not have before it any of the proceedings in the prior suit and which it had no power to review. It properly refused to go into the question of the Circuit Court's equity jurisdiction over the representative suit. The adoption of the rule contended for by appellant would be disruptive of the orderly process of our courts and fatal to the well-known principle that there must be an end to litigation. We find that the questions argued by appellant cannot be reached and passed upon."

In *Schmidt* v. *Modern Woodmen,* 261 Ill. App. 276, 281, the court said:

"The *Jenkins* suit was brought in behalf of the complainants and in behalf of all other members of the Society. It was a class suit. Where a *bona fide* Bill is filed and litigated by the representatives of a class and the subject-matter of the suit is com-

mon to all, the decree binds the entire class as fully as if all were before the Court. *People* v. *Clary*, 296 Ill. 46".

In *Greenberg* v. *Chicago*, 256 Ill. 213, 219, the bar was extended to all issues which might have been raised in the prior suit whether they were or not.

> "* * * the rule applies with particular force that the doctrine of former adjudications is not confined to the questions actually decided, but it extends to all grounds of recovery or defense which existed and might have been presented. * * * The complainants in this proceeding were represented by the complainants in the former suit and are therefore bound by the decree therein entered. The remedy in suits of the character here indicated is in the interest of a class of individuals having common rights that need protection, and in the pursuit of that remedy individuals have the right to represent the class to which they belong."

And in *People ex rel. Modern Woodmen* v. *Circuit Court*, 347 Ill. 34, 46, it was held:

> "The rule concerning *res judicata* embraces not only what was actually determined in the former case between the same parties or their privies, but it extends to any other matter properly involved which might have been raised and determined and to all grounds of recovery or defense which might have been presented (*Phelps* v. *City of Chicago*, 331 Ill. 80; *People* v. *Harrison*, 253 id. 625; *Godschalck* v. *Weber*, 247 id. 269."

A document once held valid by a court of competent jurisdiction cannot be attacked by the parties or their privies in a subsequent suit. In *Hanna* v. *Read*, 102 Ill. 596, 602, 606, it was held:

> "* * * where some specific fact or question has been adjudicated and determined in a former

suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not. This species of estoppel is known to the law as an estoppel by verdict, and is equally available to a plaintiff in support of his action, when the circumstances warrant it, as when offered by a defendant as matter of defense. * * * It is further objected that the parties to the former and present suits are not the same. This objection we do not regard as tenable. It is sufficient for the purpose of the rule relating to a former adjudication, when relied on as an estoppel that the parties be substantially the same, and so we regard them in the present case. *Thompson* v. *Roberts,* 24 How. 233; 7 Rob. Prac. 1^7; *Drake* v. *Perry,* 58 Ill. 122."

Harding Co. v. *Harding,* 352 Ill. 417, 426, sets forth the Illinois law on *res judicata.*

"The doctrine of *res judicata* is, that a cause of action finally determined between the parties on the merits, by a court of competent jurisdiction, cannot again be litigated by new proceedings before the same or any other tribunal, except as the judgment or decree may be brought before a court of appellate jurisdiction for review in the manner provided by law. A judgment or decree so rendered is a complete bar to any subsequent action on the same claim or cause of action between the same parties or those in privity with them. The doctrine extends not only to the questions actually decided but to all grounds of recovery or defense which might have been presented. (*Wright* v. *Briffey,* 147 Ill. 496; *Markley* v. *People,* 171 id. 260; *Terre Haute and Indianapolis Railroad Co.* v. *Peoria and Pekin Railway Co.,* 186 id. 283; *God-*

schalck v. *Weber*, 247 id. 269; *People* v. *Harrison*, 253 id. 526. * * * Whether the adjudication relied on as an estoppel goes to a single question or all the questions involved in the case, the fundamental principle upon which it is allowed is that justice and public policy alike demand that a matter, whether consisting of one or many questions, which has been solemnly adjudicated in a court of competent jurisdiction, shall be deemed finally and conclusively settled in any subsequent litigation between the same parties where the same question or questions arise, except where the litigation is a direct proceeding for the purpose of reversing or setting aside such adjudication." * * * *

In *Bayer* v. *Block*, 246 Ill. App. 416, 421, 423, 424, the doctrine was applied to a consent decree based on a stipulation:

"In the stipulation, filed in said chancery cause, it was agreed between all the parties that they 'hereby waive further proceedings * * * and that an order of court may be entered, reciting the facts and the making of this agreement, etc. * * *.' In *Godschalck* v. *Weber*, 247 Ill. 269, 274, it is said: 'The doctrine of *res judicata* extends not only to the questions which were actually decided in the former case, but to the whole controversy, to all matters properly involved which might have been raised and determined, and to all grounds of recovery or defense which the parties might have presented, whether they did so or not.' (See also *Stickney* v. *Goudy*, 132 Ill. 213, 231; *South Park Com'rs.* v. *Ward & Co.*, 246 Ill. 299, 312) * * *. In view of these authorities, and applying them to the facts as disclosed in the present transcript and as above outlined, we are of the opinion that the contentions of defendant's counsel are well founded; that the consent decree, entered in said equity suit upon motion of complainants' solicitor

and upon stipulation, is *res judicata* of the controversy in the present suit at law, and is, under the doctrine of estoppel by verdict, a bar to any recovery by plaintiffs herein, it appearing that the parties to the two suits are substantially the same; and that the trial court erred, as a matter of law, in entering the judgment appealed from, and that it should be reversed without remanding the cause."

The bar covers newly discovered evidence, *People* v. *Prather,* 343 Ill. 443; 447.

"We shall not consider at length the insufficient proof presented in support of these amendments, none of which was verified by the testimony of the drainage commissioners or clerk holding office seven (7) years earlier, (1920), when the acts are alleged to have taken place, because even newly discovered evidence does not prevent the application of *res judicata.* Many, perhaps a majority, of the cases in which the doctrine of *res judicata* is enforced are cases in which facts have been discovered after the adjudication, which, if they had been known at the former trial, might have changed the result. A judgment or decree which necessarily affirms the existence of any fact is conclusive upon the parties and their privies whenever the existence of that fact is again in issue between them. (*Gould* v. *Sternberg,* 128 Ill. 510)"

Res Judicata binds the former parties and their privies in title and interest, *Klus* v. *Ruszel,* 353 Ill. 179, 183.

"The answer of the plaintiffs in error alleges the filing of the Bill by Bialek on January 23, 1925, in the Circuit Court, and the filing of the Cross Bill by Klus, and relies, among other things, upon the decree of dismissal in that case as a final and conclusive adjudication of the rights of the parties. The parties in this case are the same as the parties in the former case or are privies in title and

> interest with them, the subject matter, cause of action and issue are the same and the quality in which the parties sue or defend is the same. The decision of the former case was upon the merits, and the fact that it was rendered on a demurrer is immaterial. (*Foss* v. *People's Gas Light Co.*, 293 Ill. 94.) It is binding on the defendants in error and conclusive of their rights."

On the record below, the Supreme Court of Illinois found the prior class suit of *Burke* v. *Kleiman* was *res judicata* on the due execution of the covenant in this case and binding on the petitioners as signers thereof or privies in estate thereto by reason of taking their titles subject to and with notice of the restrictions running with the land. We quote from the opinion herein:

> "In order to decide whether the question of due execution is *res judicata,* it will be necessary to examine the case of *Burke* v. *Kleiman, supra.* That was a suit to enforce this same agreement. Olive Ida Burke, wife of James J. Burke, a defendant in the case at bar, was plaintiff. The complaint recited that she filed it 'on behalf of herself and on behalf of all other property owners in the district covered and affected by the agreement hereinafter mentioned, and who are, or whose grantors, direct or otherwise, were parties to said indenture of agreement, and whose property interests will be adversely and injuriously affected by the violation hereinafter mentioned by the said defendants of the covenants and terms of said agreement.' The defendants were Isaac Kleiman, the white owner, Sam Kleiman, James L. Hall, a Negro tenant, and Charles J. Sopkin, trustee of a trust deed on the property. The complaint alleged the agreement was signed by the owners of ninety-five percent of the frontage and duly recorded February 1, 1928. A stipulation was entered into to this effect. The court recited the

stipulation in its decree and found that the facts stipulated were true. The court further found, 'that said indenture was in full force, and effect on February 1, 1928, and all conditions therein contained with respect to execution and recordation thereof were fully complied with;' that 'all terms of said indenture agreement are entirely valid and binding,' and that it is a covenant running with the land. This decree was affirmed by the Appellate Court.

"It thus appears that *Burke* v. *Kleiman, supra,* was a class or representative suit. It cannot be seriously contended that it was not properly a representative suit. There was a class of individuals who had common rights and who needed protection. They were so numerous it would have imposed an unreasonable hardship and burden on them to require all members to be made parties to the suit. Under such circumstances we have repeatedly held that a court of equity has jurisdiction of representative suits, and where the remedy is pursued by a plaintiff who has the right to represent the class to which he belongs, other members of the class are bound by the results in the case unless it is reversed or set aside on direct proceedings. *Groves* v. *Farmers State Bank,* 368 Ill. 35; *Leonard* v. *Bye,* 361 id. 185; *Greenberg* v. *City of Chicago,* 256 id. 213." (R. 329-330)

Respondents assigned as a cross-error in the appeal below that part of Finding 7 wherein Chancellor Bristow found "from the *competent* proof adduced" that the owners of less than 95 per cent of the frontage had signed the agreement. All of petitioner's evidence with respect to execution was received subject to respondent's objection. It is our view that when the Chancellor sustained the plea of *res judicata,* all of that proof was excluded as incompetent and not properly

before him. On this point the Supreme Court of Illinois said in its opinion (R. 330, 331):

> "Appellants contend the doctrine is inapplicable here for the reason there was no class, since the evidence shows the requirement that the owners of ninety-five per cent of the frontage sign the agreement, was not met. This argument loses sight of the fact that in *Burke* v. *Kleiman, supra,* the court had jurisdiction to determine whether or not that condition precedent had been complied with. The mere fact that it later appears that the finding is untrue does not render the decree any the less binding. The principle of *res judicata* covers wrong as well as right decisions, for the fundamental reason that there must be an *end of litigation. A matter* which has once been determined by a court of competent jurisdiction cannot, in a later suit involving the same subject matter and the same parties or members of the same class, be again inquired into * * *. We see no merit in the contention that *Burke* v. *Kleiman, supra,* is not *res judicata* because the fact of due execution was established by stipulation. There is no evidence of fraud or collusion in that case. * * * In our opinion the questions of execution and validity of the restrictive agreement are *res judicata.* The reasons assigned, in addition to these urged in *Burke* v. *Kleiman, supra,* for holding the agreement invalid cannot be considered. It is well settled that the doctrine of *res judicata* extends not only to matters actually determined in the former suit, but also embraces all grounds of recovery and defense involved and which might have been raised. By assigning new reasons for holding the agreement invalid, which existed at the time that decision was rendered, the parties cannot relitigate the question settled by the prior decree. *In re Northwestern University,* 206 Ill. 64; *Midlinsky* v. *Rubin,* 341 id. 378; *People* v. *Wade,* 351 id. 484; *Webb* v. *Gilbert,* 357 id. 340."

(See also: Phelps v. City of Chicago, 331 id. 80, p. 85.)

This court recognizes that *res judicata* is a question of state law. *Kersh Lake Drainage Co.* v. *Thompson,* 309 U. S. 485, 491. *Oklahoma Packing Co.* v. *Gas Co.,* 309 U. S. 4, 8; *Union and Planters Bank* v. *Memphis,* 189 U. S. 71, 75; *Covington* v. *1st National Bank of Covington,* 198 U. S. 100, 109; and *Wright* v. *Georgia Railroad and Banking Co.,* 216 U. S. 420, 429.

It follows that the decision below was rested upon a point of state law adequate to support it. We have shown that there was no fraud involved (except such as can be imputed to these petitioners) and, in the absence of fraud, no federal question for review by this Court is presented.

The opinion of the Supreme Court of Illinois does not mention petitioner's contention that the application of the doctrine in this case denies their rights to due process of law as citizens of the United States. The contention was forcibly urged below and it cannot be assumed to have been ignored. On the contrary, in balancing the equities, the court must have considered that petitioner's own misconduct estopped them from attacking respondent's plea of *res judicata* and that the decree binding them as members of a class whose rights were represented in the prior suit does not offend the Fourteenth Amendment. This is the question to which we shall next address ourselves.

4. The State Court Decree Does Not Offend the Fourteenth Amendment.

Section 1 of the Fourteenth Amendment has been bandied about in such loose language by the Petitioners that a detailed examination of it is in order. It contains three inhibitions on the States. The first bars

the making or enforcing of any law which shall abridge the privileges or immunities of citizens of the United States. The second prevents the deprivation of any person's life, liberty or property without due process of law. The third prohibits the denial to any person within its borders of the equal protection of the laws.

We are not concerned here with the first or third inhibitions. They were disposed of in *Corrigan* v. *Buckley,* 299 Fed. 899, wherein the court pointed out with respect to the first that the constitutional privilege of a negro to own property does not carry with it the constitutional right to compel sale and conveyance to him of any particular private property. The court disposed of the third inhibition by stating that the power of the white owners to exclude negroes from their property implies the power of negro owners to exclude whites from their property so that the law protects both classes equally.

We are concerned with the second prohibition after eliminating the protection to life and liberty. As applied to this case, it reads:

> *"Nor shall any State deprive any person of * * * property without due process of law."*

The first inquiry, therefore, is what property of these petitioners is involved. The record reveals that the only property of which the state court could deprive any of these petitioners is Hansberrys apartment and restricted lot, which he acquired through the fraud of his conspirators. The invocation of this constitutional provision by all the other petitioners is therefore without merit. The decree complained of requires the white conspirator Burke to observe a restriction which was on his property before he acquired title and of which he had actual knowledge. It re-

quires the white Petitioner Katz to abide by his own agreement with other property owners. It requires the petitioner insurance company through the colored Petitioner Pace, its president, to stop inducing breaches of a private contract. With due regard for the liberal construction which this constitutional safeguard should be accorded, as far as these petitioners are concerned, there is no property on this record for the due process clause of the Fourteenth Amendment to protect.

In *Enterprise Irrig. Dist.* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 166, Mr. Justice Van Devanter said:

> "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law. *Sayward* v. *Denny*, 158 U. S. 180, 186; *Central Land Co.* v. *Laidley*, 159 U. S. 103; *Castillo* v. *McConnico*, 168 U. S. 674, 683-684.

Petitioners argue that their paramount and dominant "right to live and a place to live in" as free citizens of the United States have in some way been abridged by the Illinois Courts, citing *Colgate* v. *Harvey*, 296 U. S. 404, 427. In this, they fall into the same error as the appellants in the *Gorrigan* case. Petitioners are at liberty to acquire and exercise all of the rights of ownership of real estate, including the right to exclude white people by private agreement among themselves, except the small area in Chicago which is subject to the restriction at bar. The decision of the Illinois courts does not affect these rights in any way. It is argued that *Colgate* v. *Harvey* extended the scope of the Fourteenth Amendment by recognizing federal rights stemming from United States citizenship as

paramount and dominant to rights derived from state citizenship. While we do not understand any such federal rights to be involved here we must point out that *Colgate* v. *Harvey* has been expressly overruled in *Madden* v. *Kentucky,* 309 U. S. 83, 93.

5. Specific Performance Does Not Offend the Fourteenth Amendment.

The decree did not require Hansberry to convey his fraudulently acquired title without compensation. It afforded him thirty days to comply with the covenant by conveying to any person other than a negro for any consideration of his choice. The deed to him had been declared void and a nullity by the trial court and the Supreme Court of the State of Illinois. Here, by the provisions in the decree the court gave Hansberry the opportunity to save himself from the penalties of forfeiture, despite the fraud he had perpetrated and further protected him in the event he refrained from acting voluntarily, by placing the title back in his grantor and dummy, the last white owner to hold it, thus removing the continuing violation of the covenant and remaking the title merchantable. It but performed as to the title what the writ of assistance did as to the possession in the enforcement of the injunction. It stopped the continuing violation of the covenant, as a proper incident in enforcing the decree, under the prayer for general relief. No compensation was due to the tort feasor Hansberry in accomplishing this relief. No property of his was taken from him. His deed was void and a nullity. He was entitled to no recompense as a price to be paid by these respondents to relieve them of the fraud he had inflicted upon them. See *Svalina* v. *Saravans,* 341 Ill. 236, at p. 249:

> "It is insisted by appellants that the master and the decree found that the deed to Svalina should

> be set aside as a cloud upon the title of Anna Yelich but erroneously failed to return to Svalina the $500 loaned by him to Yelich. * * * In *Beidler* v. *Crane,* 135 Ill. 92, it was held that a transfer of property must not only be upon a good consideration but it must also be bona fide; that even though the grantee pays a valuable, adequate and full consideration, yet if the grantor sells for the purposes of defeating the claims of creditors and the grantee knowingly assists in such fraudulent intent, or even has notice thereof, he will be regarded as a participant in the fraud, and that a deed fraudulent in fact may be set aside by creditors, and it will not be permitted to stand for the purpose of reimbursement or indemnity. Several authorities were cited in that case supporting this holding. These authorities were sufficient to uphold the decree denying to Svalina any right of reimbursement from Anna Yelich for the $500."

We submit that bringing the property within the terms of the covenant was the only way its merchantable status could be restored so that the master's deed would benefit Hansberry instead of deprive him of his property within the meaning of the Fourteenth Amendment.

The Court of Appeals for the District of Columbia was faced with the suggested conflict between specific performance of such a covenant and the Fourteenth Amendment in *Cornish* v. *O'Donoghue,* 30 Fed. (2d) 983, wherein the deed to the negro was recorded before suit was filed. The court rejected the Constitutional objection and sustained a decree, declaring the deed void and enjoining the defendants "forthwith peremptorily to remove themselves and all their personal property and that of each of them from the said premises" without mention of compensation. Similar

decrees were sustained in *Torrey* v. *Wolfes,* 6 Fed. (2d) 702 and *Russell* v. *Wallace,* 30 Fed. (2d) 981.

This court said in *Fox River Co.* v. *R. R. Comm.,* 274 U. S. 651, 657:

> "It is for the state court in cases such as this to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determined to be non-existent."

6. The Record Supports the Injunction Against Katz.

The decree obliges Petitioner Katz to abide by his own agreement with the other property owners who signed the covenant. His signature and acknowledgment are at pages 319 and 323 of the record. In 1937, Katz was a witness in an administrative proceeding before the State Department of Education and Registration at Chicago. He was asked, "Would you sell your property at 6018 Vernon Avenue, Chicago, Illinois, to the colored people, notwithstanding the agreement that is recorded in the particular district, Washington Park District, in which your property is located and in which you, the owner, then owner of your property was a signer, or yourself?" He replied under oath, "Yes, I would. I would sell it to anybody that I could get a buyer to purchase it. I would sell it now if I could." (R. 122.) This evidence adequately supports the injunction against Katz and deprives him of nothing which is protected by the Fourteenth Amendment.

The Insurance Company is Not Exempt as a Mortgagee.

Paragraph 3 of the covenant contains the following proviso:

> "and provided, further, that the lien of no mortgage or trust deed in the nature of a mortgage shall be impaired or invalidated by reason of the breach of any of the provisions of this agreement, whether any such breach shall have occurred prior or subsequent to the recording of any such mortgage or trust deed; and provided, further, that nothing contained in the foregoing provisos shall in any manner impair the right of any person or persons interested to enforce at all times and against all persons the restrictions in this agreement contained prohibiting the use or occupation of all or any part of said premises by a negro or negroes" (R. 316).

Petitioners contend that this exempts mortgagees from the operation of the covenant and that the decree enjoining the Supreme Liberty Life Insurance Company from making future loans on restricted property to or for negroes was erroneous. As we read the proviso, its purpose is to protect mortgages on restricted property from impairment in proceedings such as this to enforce the covenant. The decree complained of does not impair this petitioner's mortgage on the Hansberry property. It protects the mortgage by restoring the property to a legal and merchantable status within the covenant. The proviso does not permit mortgagees to conspire in the future to induce breaches of the private agreement between the property owners and thus destroy the covenant. The evidence shows that is what this company was doing and the injunction simply requires it to stop its unlawful activity under the prayer for general relief. It raises no federal question and should not be disturbed.

CONCLUSION.

We have shown the private agreement between the property owners to be valid under Illinois law and not offensive to the Federal Constitution. All the petitioners, except the insurance company, which however was one of the conspirators, either signed it or are privies thereto by reason of having derived their titles from persons who signed it. All the petitioners had actual as well as constructive notice of the burdens appurtenant to the restricted property. Their conspiracy to destroy it is of record. On the day of reckoning, they complain of the loss of certain defenses which they might have urged if the court had not bound them, as a matter of local law, by a prior decision that the covenant is valid. Their rights in the prior case were represented by a member of the class to which they belong. They attack the prior case as fraudulent but the record is barren of fraud—except their own. They charge there is no restrictive agreement because of defects in its execution and place great reliance on the comments of the Chancellor in this regard. As to this, it should be noted that the Chancellor with manifest fairness to the petitioners, heard every defense they advanced, subject to our objection. When the record was complete, he sustained our objection, held the prior suit *res judicata* and found petitioners estopped by their own misconduct to question the bar of the prior suit. They have had their day in court and a full and fair hearing. They have argued with great feeling that there is something unfair in obliging them to observe an agreement which they claim does not exist. We think one of the answers to this is that after nine years of effective operation, they voluntarily resorted to a fraudulent conspiracy to get around it.

We respectfully request that the Supreme Court of Illinois be affirmed or that the writ of certiorari be dismissed for want of jurisdiction.

ANGUS ROY SHANNON,
McKENZIE SHANNON,
WILLIAM C. GRAVES,
PRESTON B. KAVANAGH,
RANDOLPH THORNTON,
Attorneys for Respondents.

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P. 4.

SUPREME COURT OF THE UNITED STATES.

No. 29.—October Term, 1940.

Carl A. Hansberry, Nannie L. Hansberry, et al., Petitioners,
vs.
Anna M. Lee, Edward L. Govanus, Esther Govanus, et al.

On Writ of Certiorari to the Supreme Court of the State of Illinois.

[November 12, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

The question is whether the Supreme Court of Illinois, by its adjudication that petitioners in this case are bound by a judgment rendered in an earlier litigation to which they were not parties, has deprived them of the due process of law guaranteed by the Fourteenth Amendment.

Respondents brought this suit in the Circuit Court of Cook County, Illinois, to enjoin the breach by petitioners of an agreement restricting the use of land within a described area of the City of Chicago, which was alleged to have been entered into by some five hundred of the land owners. The agreement stipulated that for a specified period no part of the land should be "sold, leased to or permitted to be occupied by any person of the colored race", and provided that it should not be effective unless signed by the "owners of 95 per centum of the frontage" within the described area. The bill of complaint set up that the owners of 95 per cent of the frontage had signed; that respondents are owners of land within the restricted area who have either signed the agreement or acquired their land from others who did sign and that petitioners Hansberry, who are Negroes, have, with the alleged aid of the other petitioners and with knowledge of the agreement, acquired and are occupying land in the restricted area formerly belonging to an owner who had signed the agreement.

To the defense that the agreement had never become effective because 95 per cent of the frontage owners had not signed it, respondents pleaded that that issue was *res judicata* by the decree in

an earlier suit. *Burke* v. *Kleiman,* 277 Ill. App. 519. To this petitioners pleaded, by way of rejoinder, that they were not parties to that suit or bound by its decree, and that denial of their right to litigate, in the present suit, the issue of performance of the condition precedent to the validity of the agreement would be a denial of due process of law guaranteed by the Fourteenth Amendment. It does not appear, nor is it contended that any of petitioners is the successor in interest to or in privity with any of the parties in the earlier suit.

The circuit court, after a trial on the merits, found that only about 54 per cent of the frontage owners had signed the agreement, and that the only support of the judgment in the *Burke* case was a false and fraudulent stipulation of the parties that 95 per cent had signed. But it ruled that the issue of performance of the condition precedent to the validity of the agreement was *res judicata* as alleged and entered a decree for respondents. The Supreme Court of Illinois affirmed. 372 Ill. 369. We granted certiorari to resolve the constitutional question. 309 U. S. 652.

The Supreme Court of Illinois, upon an examination of the record in *Burke* v. *Kleiman, supra,* found that that suit, in the Superior Court of Cook County, was brought by a landowner in the restricted area to enforce the agreement which had been signed by her predecessor in title, in behalf of herself and other property owners in like situation, against four named individuals who had acquired or asserted an interest in a plot of land formerly owned by another signer of the agreement; that upon stipulation of the parties in that suit that the agreement had been signed by 95 per cent of all the frontage owners, the court had adjudged that the agreement was in force, that it was a covenant running with the land and binding all the land within the described area in the hands of the parties to the agreement and those claiming under them including defendants, and had entered its decree restraining the breach of the agreement by the defendants and those claiming under them, and that the appellate court had affirmed the decree. It found that the stipulation was untrue but held, contrary to the trial court, that it was not fraudulent or collusive. It also appears from the record in *Burke* v. *Kleiman* that the case was tried on an agreed statement of facts which raised only a single issue, whether by reason of changes in the restricted area, the agreement had ceased to be enforcible in equity.

From this the Supreme Court of Illinois concluded in the present case that *Burke* v. *Kleiman* was a "class" or "representative" suit and that in such a suit "where the remedy is pursued by a plaintiff who has the right to represent the class to which he belongs other members of the class are bound by the results in the case unless it is reversed or set aside on direct proceedings"; that petitioners in the present suit were members of the class represented by the plaintiffs in the earlier suit and consequently were bound by its decree which had rendered the issue of performance of the condition precedent to the restrictive agreement *res judicata*, so far as petitioners are concerned. The court thought that the circumstance that the stipulation in the earlier suit that 95 per cent of the frontage owners had signed the agreement was contrary to the fact as found in the present suit did not militate against this conclusion since the court in the earlier suit had jurisdiction to determine the fact as between the parties before it and that its determination, because of the representative character of the suit, even though erroneous, was binding on petitioners until set aside by a direct attack on the first judgment.

State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. *Western Life Indemnity Co.* v. *Rupp*, 235 U. S. 261, 273.

It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer* v. *Neff*, 95 U. S. 714; 1 Freeman on Judgments (5th ed.), § 407. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, R. S. § 905, 28 U. S. C. § 687, prescribe, *Pennoyer* v. *Neff*, *supra*; *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Hall* v. *Lanning*,

91 U. S. 160; *Baker* v. *Baker, E. & Co.*, 242 U. S. 394, and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires. *Postal Telegraph Cable Co.* v. *Newport*, 247 U. S. 464; *Old Wayne Mut. L. Ass'n* v. *McDonough*, 204 U. S. 8.

To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it. *Smith* v. *Swormstedt*, 16 How. 288; *Royal Arcanum* v. *Green*, 237 U. S. 531; *Hartford L. Ins. Co.* v. *Ibs*, 237 U. S. 662; *Hartford Life Ins. Co.* v. *Barber*, 245 U. S. 146; *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U. S. 356; cf. *Christopher* v. *Brusselback*, 302 U. S. 500.

The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the former fairly represent the latter in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree. *Brown* v. *Vermuden*, Ch. Cas. 272; *City of London* v. *Richmond*, 2 Vern. 421; *Cockburn* v. *Thompson*, 16 Ves. Jr. 321; *West* v. *Randall*, 2 Mas. 181; *Beatty* v. *Kurtz*, 2 Pet. 566; *Smith* v. *Swormstedt, supra; Supreme Tribe of Ben Hur* v. *Cauble, supra;* Story, Equity Pleading (2d ed.) § 98.

It is evident that the considerations which may induce a court thus to proceed, despite a technical defect of parties, may differ from those which must be taken into account in determining whether the absent parties are bound by the decree or, if it is adjudged that they are, in ascertaining whether such an adjudication satisfies the requirements of due process and of full faith and credit. Nevertheless there is scope within the framework of the

Constitution for holding in appropriate cases that a judgment rendered in a class suit is *res judicata* as to members of the class who are not formal parties to the suit. Here, as elsewhere, the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits; cf. *Brown* v. *New Jersey*, 175 U. S. 172; *Brown* v. *Mississippi*, 297 U. S. 278; *United Gas Public Service Co.* v. *Texas*, 303 U. S. 123; *Avery* v. *Alabama*, 308 U. S. 444, 446, 447, nor does it compel the adoption of the particular rules thought by this court to be appropriate for the federal courts. With a proper regard for divergent local institutions and interests, cf. *Jackson County* v. *United States*, 308 U. S. 343, 351, this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 235.

It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, *Plumb* v. *Goodnow*, 123 U. S. 560; *Confectioners' Machinery Co.* v. *Racine Engine & Mach. Co.*, 163 Fed. 914; 170 Fed. 1021; *Bryant El. Co.* v. *Marshall*, 169 Fed. 426, or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. *Smith* v. *Swormstedt*, *supra*; cf. *Christopher* v. *Brusselback*, *supra*, 503, 504, and cases cited.

In all such cases, so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented though absent, which would satisfy the requirements of due process and full faith and credit. See *Bernheimer* v. *Converse*, 206 U. S. 516; *Marin* v. *Angedahl*, 247 U. S. 142; *Chandler* v. *Peketz*, 297 U. S. 609. Nor do we find it necessary for the decision of this case to say that, when the only

circumstance defining the class is that the determination o
rights of its members turns upon a single issue of fact or law, a
could not constitutionally adopt a procedure whereby some
members of the class could stand in judgment for all, provide
the procedure were so devised and applied as to insure that
present are of the same class as those absent and that the litig
is so conducted as to insure the full and fair consideration
common issue. Compare *New England Divisions Case,* 261
184, 197; *Taffart* v. *Bremner,* 236 Fed. 544. We decide only
the procedure and the course of litigation sustained here by the
of *res judicata* do not satisfy these requirements.

The restrictive agreement did not purport to create a joint
gation or liability. If valid and effective its promises wer
several obligations of the signers and those claiming under
The promises ran severally to every other signer. It is plain
in such circumstances all those alleged to be bound by the a
ment would not constitute a single class in any litigation br
to enforce it. Those who sought to secure its benefits by enfo
it could not be said to be in the same class with or represent
whose interest was in resisting performance, for the agreeme
its terms imposes obligations and confers rights on the own
each plot of land who signs it. If those who thus seek to s
the benefits of the agreement were rightly regarded by the
Supreme Court as constituting a class, it is evident that
signers or their successors who are interested in challengin
validity of the agreement and resisting its performance are n
the same class in the sense that their interests are identical so
any group who had elected to enforce rights conferred by the a
ment could be said to be acting in the interest of any others
were free to deny its obligation.

Because of the dual and potentially conflicting interests of
who are putative parties to the agreement in compelling or resi
its performance, it is impossible to say, solely because they
parties to it, that any two of them are of the same class. Nor
out more, and with the due regard for the protection of the n
of absent parties which due process exacts, can some be perm
to stand in judgment for all.

It is one thing to say that some members of a class may repr
other members in a litigation where the sole and common int

of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. *Smith* v. *Swormstedt, supra; Supreme Tribe of Ben Hur* v. *Cauble, supra; Groves* v. *Farmers State Bank,* 368 Ill. 35. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far. See *Terry* v. *Bank of Cape Fear,* 20 Fed. 777, 781; *Weidenfeld* v. *N. Pac. Ry. Co.,* 129 Fed. 305, 310; *McQuillen* v. *National Cash Register Co.,* 22 F. Supp. 867, 873, aff'd 112 F. (2d) 877, 882; *Brenner* v. *Title Guarantee & Trust Co.,* 276 N. Y. 230; cf. *Wabash R. R. Co.* v. *Adelbert College,* 208 U. S. 38; *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413. Apart from the opportunities it would afford for the fraudulent and collusive sacrifice of the rights of absent parties, we think that the representation in this case no more satisfies the requirements of due process than a trial by a judicial officer who is in such situation that he may have an interest in the outcome of the litigation in conflict with that of the litigants. *Tumey* v. *Ohio,* 273 U. S. 510.

The plaintiffs in the *Burke* case sought to compel performance of the agreement in behalf of themselves and all others similarly situated. They did not designate the defendants in the suit as a class or seek any injunction or other relief against others than the named defendants, and the decree which was entered did not purport to bind others. In seeking to enforce the agreement the plaintiffs in that suit were not representing the petitioners here whose substantial interest is in resisting performance. The defendants in the first suit were not treated by the pleadings or decree as representing others or as foreclosing by their defense the rights of others, and even though nominal defendants, it does not appear that their interest in defeating the contract outweighed their interest in establishing its validity. For a court in this situation to ascribe to either

the plaintiffs or defendants the performance of such functions on behalf of petitioners here, is to attribute to them a power that it cannot be said that they had assumed to exercise, and a responsibility which, in view of their dual interests it does not appear that they could rightly discharge.

Reversed.

Mr. Justice McReynolds, Mr. Justice Roberts and Mr. Justice Reed concur in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.